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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-634

SAMUEL MARCO DOBBS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Petitioner, Samuel Marco Dobbs, prays that a writ of certiorari issue to review the opinion and judgement of the Supreme Court of the State of California rendered in these proceedings on June 17, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, Fourth Appellate District, Division One was unreported and as reproduced in Appendix A hereto (infra p. 26). The Supreme Court of the State of California affirmed the Court of Appeals without opinion, Appendix B hereto (infra p. 42).

JURISDICTION

The final order and judgement of the Supreme Court of the State of California was entered on the 17th day of June, 1971. This petition is being filed at this date pursuant to the order of Associate Justice Douglas, dated October 21, 1971, and is reproduced in Appendix C hereto (infra p. 43).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), in that the questions presented raise the issue of the validity of a state statute and of a non-statutory rule of evidence under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the California Evidence Code § 1102 and the common law rule permitting the cross examination of character witnesses for the defendant by the use of fundamentally inadmissable hearsay and mere unproved accusations of alleged prior misconduct of defendant, violates the defendant's right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether California Evidence Code § 1102 as construed and applied violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution in that this provision compels the defendant to give up his right to confront and cross examine witnesses against him as guaranteed by the Sixth Amendment in order to exercise his right

to put forth a complete defense. May a court force the defendant to "ransom" a trial right?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amend. V:

> "No person shall . . . be deprived of life liberty or property, without due process of law . . ."

Constitution of the United States, Amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Constitution of the United States, Amend. XIV:

> "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code §1102, at p. 252 (West 1968):

> "In any criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not . . . inadmissible . . . if such evidence is:
>
> . . .

. . . .
(b) offered by the prosecution to rebut evidence adduced by the defendant . . ."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore, may be introduced to this Court in a summary fashion.

The petitioner, Samuel Marco Dobbs was charged with violation of the California Penal Code §245, a felony, by Information filed November 3, 1969, which alleged the violation to have occurred on or about the 4th day of May, 1969. Trial by jury was had in the Superior Court of the State of California, in and for the County of San Diego, on February 10, 1970.

The evidence presented at the trial was in substantial conflict. The petitioner placed three character witnesses on the stand who, in turn

testified to the petitioners reputation in the community for being a peaceful man. On cross examination, the prosecutor asked each of the various character witnesses if they had heard of or knew about conduct alleged to have been committed by the defendant in his past. To wit, an arrest for possession of a billy club, an arrest for fighting in another state and an arrest for assault with a deadly weapon. All of the petitioner's witnesses testified that they had not heard of these events and further that it would not have altered their conclusion about petitioner's reputation. Objection was made to this line of questioning; which objection was over-ruled. In addition, the state also introduced a character witness in rebuttal who testified in substance that the petitioner had a bad reputation in the community for being a

peaceful man.

A verdict of guilty as charged, dated February 17, 1970 was returned.

Appeal was thereafter taken to the District Court of Appeals, Fourth District, Division One. The issues of due process and fair trial were herein raised by petitioners briefs and argument. Said Court rendered and entered its decision on April 19, 1971 (a copy of which is annexed as App. "A").

A Petition for Hearing in the Supreme Court of the State of California was thereafter promptly filed, which petition raised issues under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Said petition was denied without opinion on June 17, 1971.

REASONS FOR GRANTING THE WRIT

1. THE COURTS BELOW HAVE DECIDED A

FEDERAL QUESTION OF SUBSTANCE IN A MANNER INCONSISTANT WITH THE PRINCIPLES OF DUE PROCESS EXPOUNDED BY THIS COURT

The rule has long seemed "settled" that, once a defendant puts on witnesses for good character, such witness may be cross examined on hearsay accusations made against the defendant. But, many a long standing rule has been reversed by this Court in the past ten years under the searching analysis of the right of the accused.

2. THE RULE REQUIRES THE SURRENDER OF ONE BASIC LEGAL RIGHT TO SECURE FROM LOSING ANOTHER.

It has long been recognized that a defendant has an unquestioned right to defend his case by all proper evidence. Included is the right to present evidence as to his character. Evidence of good character or reputation of one charged

with crime is always admissable. It is competent as evidence tending to prove or generate a reasonable doubt of guilt of the offense charged. The exclusion of such evidence has consistently been found to be error.

> Edington v. United States, 164 U.S. 361 (1896); Hawley v United States, 133 F. 2d 966 (10th Cir. 1943).

As a corollary, the state may not initially attack the accused's character despite the general relevancy of bad character to the commission of crime.

> Greer v. United States, 245 U.S. 559 (1918)

It may almost be said that, it is because of its indubitable relevance that such evidence is excluded from the state's case in chief. It is objectionable, not because it has no appreciable probative value, but because it has too much.

The nature and inevitable tendency of the

jury is to give excessive weight to the alleged record of crime and retain it in their minds as justification of condemnation irrespective of the guilt in the present charge. The jury hears - the jury is influenced - the jury forms a strong negative reaction to the defendant. The impeachment value cannot be separated from the inflammatory. The bell has rung - the jury has heard unproved and unprovable accusations, inflaming opinions against the defendant although it may well turn out, as here, that the questions have no impeachment value. Accusations which can not come in directly have come before the jury indirectly - and irremediably.

Defendant can avoid this risk by avoiding character witnesses. But, in doing, he must weaken his case. See Edington v. United States, supra. He is denied a portion of his case because

of the dangers of this uncensored and irresponsible attack. Thus, the rule, as in effect today unquestionably deters many from introducing needed character evidence as part of their defense, but unfairly leaves it available to a person who has never been accused falsely or otherwise. Thus the rule extends a helpful, but illogical option to the defendant.

> Michelson v. United States, 335 U.S. 469 478-79 (1948).

Is it not basically discriminatory against persons who, through political, ethnic, occupational or physical characteristics are more exposed to baseless accusations and arrest without conviction than are other persons. Clearly the cloistered person without active exposure to the competitive and adversary aspects of life has a discriminatory advantage over another with the same degree of innocence but a life with a higher history of exposure. It is this illogical

option that cries out for the rules abrogation.

It is inconsistant with our traditional conception of a fair trial to permit any information to go to the jury which might influence it to convict a defendant for any reason other than guilt of the offense charged.

> United States v. Dressler, 112 F.2d 972-77 (7th Cir. 1940); Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir 1948).

The defendant is confronted with the dilemma of "opening the door". To show what might be an essential fact in the case, he must, without limitation, permit the prosecutor to bring in every vicious, unfounded, vendetta-motivated, uninvestigated accusation against him, whether or not it has been proved to be totally unfounded.

Enjoyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right. The defendant's voluntary choice to include a character witness in his

defense does not operate as a waiver of his Sixth Amendment right of confrontation and cross examination.

> Compare Brookhart v. Janis, 384 U.S. 1 (1966) with United States v. Jackson, 390 U.S. 570 (1968).

Denial of the benefit of confrontation to individuals operates as a subtle but nontheless potent form of compulsion for them to forego the assertion of constitutional rights. The concern of this Court has not only been with the fundamental unfairness of any constitutional condition; Patton v. North Carolina, 381 F.2d 636 (4th Cir 1967) cert denied 390 U.S. 905 (1968); but also with the deterrent effect that the exaction of such a price has on the exercise of the defendant's rights.

> United States v. Jackson, supra; Garrity v. New Jersey, 385, U.S. 493 (1967).

The Supreme Court of California has recently

had occasion to take up this problem and in the case of Bagley v. Washington Township Hosp. Dist., 65 Cal 2d 499, 506, 421 P.2d 409, 415, 55 Cal. Rptr. 401, 407 (1966) and concluded that:

> [I]n imposing conditions upon the enjoyment of publicly conferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity. . . . . (emphasis added)

Clearly then, by the use of the standards enunciated by the California Supreme Court the rule must fail. The prosecution should be required to call witnesses who will qualify, as the witnesses for the defense are required. They may contradict the testimony of the defense character witnesses, but, the entire line of inquiry through cross examination concerning specific acts of conduct in the defendant's past must be foreclosed.

This would leave room for proper rebuttal without turning the defendant's trial for a specific offense into one for all previous accusations against him of misconduct, criminal or otherwise. Furthermore, it would put the state on the same plane as the defense in relation to the use of, and the quantum of character evidence. It is totally inconsistent with today's notions of due process to permit the prosecution to do indirectly what it may not do directly; especially when, as here, it would grant to them a higher level of inquiry then available to the defendant. This view has recently been reaffirmed by the Ohio courts in the case of State v. Elliot, 25 Ohio St 2d 249, 267 N.E.2d 806 (1971) in which it was held that the state was limited to general reputation evidence in rebuttal to the defense character witnesses and that evidence of specific acts of

conduct bearing on character was inadmissable.

3. IT DENIES THE CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS EXAMINATION

This court has repeatedly recognized and reaffirmed the unimpeachable importance of the right of confrontation.

> Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

Technically, all hearsay violates the confrontation clause in criminal cases, but the numerous exceptions to the rule have survived because of their particular reliability and their limited susceptibility to the accepted hearsay dangers.

> United States v. Maddox, 165 U.S. 237 (1895)

Confrontation however, is more than a direct guarantee of reliability; it incorporates an element of fairness, of affording the defendant an opportunity to test evidence against him, no matter how

reliable that evidence may seem.

Bruton v. United States, 391 U.S. 123 (1968). The prejudicial effect, Ditton v. Evans, 27 L. Ed. 2d 213 (1971); as well as the opportunity to cross examine the declarant, Nelson v. O'Neil, 29 L. Ed.2d 222 (1971), are relevant factors. However, protection of the right of confrontation is inconsistent with a simultaneous expansion of the hearsay exceptions. While hearsay may not violate the rule, simple reliability guarantees are not enough if such evidence violates the fairness element of confrontation.

Hearsay accusations against the defendant used in cross examination of his character witnesses do not however, come within the hearsay rule, they are not offered to prove the truth of the matter asserted therein. Nevertheless, such statements do deny the right of confrontation,

and because they are so highly prejudicial the judge's instruction to the effect that they are only to be used for impeachment purposes will not cure the infringement of the defendant's Sixth Amendment right of confrontation.

Bruton v. United States, supra.

As Justice Jackson stated in Krulewitch v. United States, 336 U.S. 440, 453 (1948) (concurring opinion):

> THE NAIVE ASSUMPTION that prejudicial effects can be overcome by instructions to the jury . . . is known to be unmitigated fiction . . . .

The instant case does not involve an isolated instance in which evidence used for one purpose may be improperly considered by the jury for a different purpose. For example, when the accused has not put character in issue on the question of probabilities, the use of a previous felony conviction to impeach him as a witness undoubtedly

has a worse effect. The admission of such evidence has been severely criticized.

The mere presence of such similar unfortunate rules, however, does not justify its continued abuse. In a criminal law system whose reliability guarantees are imperfect, the notion of due process requires that we insure that any mistakes tend to favor the defendant.

All of the deformation of hit and run accusations and the heavy responsibility for making it and attempting to bear it out are removed from the phantom accuser. The defendant is denied his constitutional right to confront and cross examine him. But, the accuser, protected by anonymity, has already testified against the defendant by simply making an accusation. This is not unlike the early pillory, with it's defendant locked in the stocks and the village hooligan throwing

mud at him.

4. THE RULE DENIES THE DEFENDANT HIS RIGHT TO A FAIR TRIAL

The rationale behind permitting the impeachment of a character witness by use of alleged prior misconduct is that "if" he had heard of the conduct, it would cast serious doubt on the witness' testimony thus serving a legitimate rebuttal function; and if he had not, it would tend to show that the witness did not know enough about the defendant's reputation to be qualified to testify.

In reality, however, it is clear that the prosecutor is in no way interested in the answers. He is only concerned with asking the question, which in a very real sense violated the rule forbidding counsel to testify indirectly by asking questions. In the everyday scheme of life, prosecutors are aware that a defendant's arrest record can only be brought to the attention of the jury when the

"door" is flung open. It is apparent that they lay in wait, with the intention of bringing this evidence before the jury. If the defendant does not open the door, the prosecutor must try to circumvent the rule and such attempts have universally failed. Thurman v. United States, 316 F.2d 205 (1963) (suggestion by leading questions that defendant had been arrested on prior occasions). People v. Kidd, 56 Cal. 2d 759, 16 Cal. Rptr. 793, 366 P2d 49 (1962) (prosecutor's misconduct in waiving "rap sheet" before the jury inferring prior arrests); State v. Markowitz, 138 Ohio 106, 33 N.E.2d 1 (1941) (comment by prosecutor to jury on accused failure to produce character witness).

Is not any probative or impeaching value of such cross examination de minimis in view of inherent failure of materiality or relevance and

grossly outweighed by the prejudicial effect. Absent an out-of-jury presence hearing on each proposed question, can there by any relevance as to reputation in the community where there is no basis to presume the impeaching event has even been known? And, in character opinion testimony, can it be relevant in its effect on opinion unless, it is presented in all the context in which the item would have been heard - a courtroom impossibility.

When a character witness is cross examined about other arrests and alleged bad acts of the defendant, the prosecutor should at least be required to show that knowledge of these facts abound in the community or are at least known by someone other than the police, the courts and the prosecutor so as to actually have an effect on reputation. As a practical matter, the prose-

cution does not know of the circulation of rumor and invariably obtains the information from a defendant's arrest record. The "good faith" limitation is meaningless; it only requires that the prosecutor know the accusation was made; not that he knew it to be true or even that it be known in the community. Furthermore, nothing is established to show the community reputation of the phantom accuser for credibility.

Does any possible exploration of the questions on relevancy and materiality not lead to endless trial of collateral issues?

Character evidence is, for the most part, the evidenciary manifestation of the presumption of innocence. It is an essential although routine phase of the defense in every criminal case. Yet, the state is allowed to grasp onto this one element of the defense so as to inflict a barrage

of innuendo and unsupported accusations. The state has its case in chief to rebutt the presumption of innocence and should therefore be limited to general reputation evidence in rebuttal to offset any unwarranted favorable character inference raised by the defense. This is not to deny the state the right to cross examine but rather to restrict the scope of the cross examination to inquiry regarding the witnesses qualifications. The prejudice that the present rule permits far outweighs the possible benefits derived and the availability of less offensive alternatives necessitates the abrogation of the rule. No reason exists for this major transgression against the defendant's right to be tried only for the offense charged - every reason exists to abolish it.

CONCLUSION

For these reasons, a writ of certiorari should

issue to review the judgement of the Supmere Court of the State of California.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A.

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,	)	
	(	
Plaintiff and	)	
Respondent,	(	4 Crim. No. 4269
	)	
v	(	O P I N I O N
	)	
SAMUEL MARCO DOBBS,	(	Court of Appeal Fourth
	)	Dist. F I L E D
Defendant and	(	Apr 19 1971
Appellant.	)	John R. McDowell, Clerk

APPEAL from a judgement of the Superior Court of San Diego County. Leland C. Nielsen, Judge. Affirmed.

Herbert M. Porter, for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Joel S. Moskowitz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was convicted by jury verdict of the offense of assault with a deadly weapon and by

means of force likely to produce great bodily injury; was granted probation; and appeals.

On May 4, 1969, defendant and several other men assaulted Robert Pinkerton in a bar, striking him with their fists, knocking him to the floor, kicking him in the face while he was down and breaking beer glasses and pitchers over his head. The men, including defendant, were identified as members of a motorcycle gang known as the "Iron Horsemen". Defendant claimed he no longer was a member of the gang. Pinkerton suffered the loss of two upper front teeth, and his mouth was severely lacerated. Defendant testified he was present when the fight occurred; attempted to break it up; and did not participate in the assault. The jury found to the contrary and its verdict is adequately supported by substantial evidence.

Mrs. Cherie Hurteau, a barmaid, witnessed the assault; on direct examination testified the defendant hit Pinkerton with a glass and kicked at him while he was down; and on cross-examination testified she saw defendant's foot strike Pinkerton, although she did not know where it struck him, and also saw defendant strike Pinkerton with a glass on the latter's "back side". In an attempt to impeach the witness, defense counsel inquired as follows:

"Q Mrs. Hurteau, was it your statement at the preliminary examination in this matter, in answer to the following questions --'You say you saw him, did you see the defendant hit the victim?

"'A No, I just seen him kicking him.

"'Q You don't know if contact was made?'

" And your answer was, 'No.'

" Did you make that statement at the preliminary examination?

"A Yes, I didn't see him hit him with his fist.

"Q Wasn't it your statement at the preliminary hearing you didn't see the kicks actually land on Mr. Pinkerton?

An objection to the last question was sustained. Defendant contends this was error. The contention is without merit. The question put to the witness to which an objection was sustained, in light of the examination preceeding it, was argumentative; obviously was premised upon an interpretation of the witness' testimony at the preliminary hearing; and was improper. The portion of the preliminary transcript read to the witness shows what her testimony was at that time. In People v Southack, 39 Cal. 2d 578, 590, the court said:

> "Control of cross-examination of a witness as to which of his conflicting statements is true should be in the sound discretion of the trial judge. ... the trial court, however, must be ever alert to protect the witness against being badgered or tricked into statements unintended by the witness."

Counsel for defendant asked no further questions respecting the witness' testimony at the preliminary hearing, or any asserted contradictions between that testimony and the testimony at the trial. The extent of cross-examination is a matter of judicial discretion and, absent a showing of abuse of discretion, the determination of the trial court in the premises is binding on appeal. (People v. LaMacchia, 41 Cal. 2d 738, 743; People v. Boehm, 270 Cal. App. 2d 13, 21.) The record at bench does not show an abuse of discretion.

Defendant presented three character witnesses who testified his reputation for "peacefulness and nonviolence" was good. On cross-examination the prosecuting attorney asked whether they had heard defendant previously had been arrested for fighting, for assault with a deadly weapon and for possession of a billy club. The witnesses

testified they had not heard of these arrests. Respecting the billy club incident, defendant testified the charge was dismissed because it was established the billy club in question was not in his possession. Defendant contends reference to his previous arrests was misconduct. There is no contention the questions did not correctly state the facts; and no issue of lack of good faith. The contention is without merit. It is well settled a character witness who testifies to a defendant's good reputation respecting a relevant character trait may be asked on cross-examination whether he had heard defendant previously had been arrested for wrongful acts inconsistent with the character trait in question. (People v. Wrigley, 69 Cal. 2d 149, 166; People v. McKenna, 11 Cal. 2d 327, 335; People v. Hinman, 253 Cal. App. 2d 896, 905.)

Defendant further contends the prosecuting attorney also was guilty of misconduct because of comments made during his argument in which he stated the victim was pounced upon "by a group of animals, beaten, and drugged and kicked"; likened the attackers to a "wolf pack" that descend upon their victim and bite it which, he said, is what the defendant did when the victim was down' and closed his argument with a statement the evidence established defendant had participated in the attack and "if you find that his conduct was just fine, above standard, nothing improper and nothing criminal about his conduct, we can board this courthouse up, we can board this courtroom up, ladies and gentlemen, just nail boards to the whole building, and then I submit and I suggest to you that you go home, get your families and move up into the hills, because, folks, it's not going to be safe on these

streets if what Sam Dobbs did to Mr. Pinkerton was not a criminal act."

Defendant was charged not only with an assault with a deadly weapon but also with an assault by means of force likely to produce great bodily injury. The closing remarks of the prosecuting attorney were directed to the issue raised by the latter charge; were premised upon the conclusion the evidence established defendant was a participant in the assault; and were directed to the question whether what he did, as shown by the evidence, was "a criminal act". It should be noted the remarks were not directed to the consequences incident to a failure of the jury to convict defendant but their failure to find the conduct with which he was charged, as shown by the evidence, was criminal.

Comments similar to those respecting the "wolf pack" have been approved in People v. Bandhauer, 66 Cal. 2d 524, 529, People v. Wein, 50 Cal. 2d

383, 396, People v. Cheary, 48 Cal. 2d 301, 317, People v. Ross, 178 Cal. App. 2d 801, 808, People v. Carr, 113 Cal. App. 2d 783, 788 and People v. Goldberg, 110Cal. App. 2d 17, 25, but also have been disapproved in People v. Travis, 129 Cal. App. 2d 29, 39 and People v. Hunter, 49 Cal. App. 2d 243, 251.

We condemn the type of comments made by this prosecuting attorney because they serve no useful purpose and merely afford a convicted defendant probable cause to appeal. However, we need not determine whether they constitute misconduct because, even assuming such, we are of the opinion, in the light of the whole record including the evidence, it is not probable a result more favorable to the defendant would have been reached if the comments had not been made; the case is not a close one; there is not a grave doubt of defendant's guilt; the alleged misconduct was not such

as to materially contribute to the verdict; and for these reasons any misconduct was not prejudicial. (People v. Watson, 46 Cal. 2d 818, 836; see also People v. Berryman, 6 Cal. 2d 331, 337; People v. Williams, 12 Cal. App. 2d 207, 213.)

Counsel for defendant did not object to the foregoing comments by the prosecuting attorney nor ask the jury be instructed to disregard them. Premised on this failure, and others hereinafter noted, defendant contends he was denied effective representation of counsel equating denial of his constitutional right to counsel. Defense counsel may have concluded silence was the better part of wisdom; the necessary reiteration incident to an objection and instruction in the premises would emphasize the remarks; and an appropriate instruction might detract from the real issue which was whether defendant's participation was as a peace maker rather than as an assailant.

Defendant testified one of the prosecuting witnesses who identified him, a man named Lichnovsky, threatened him before the fight commenced, because of an alleged incident involving Lichnovsky's girl friend. Defense counsel did not cross-examine Lichnovsky respecting his alleged antagonistic attitude toward defendant. Failure to cross-examine is asserted as proof of lack of effective representation by counsel. As the record stands, defendant's testimony was undenied. It is probable defense counsel anticipated Lichnovsky would deny any accusation of antagonism if he were examined respecting such, and concluded it would be to defendant's benefit to rest the case upon his undenied testimony.

Defendant also asserts, as a basis for the charge of ineffective representation, his counsel's failure to inquire of the witnesses whether a man named

Thompson, who allegedly was of the same build as the defendant, and looked like him, was present at the bar when the fight occurred and might have been mistaken for defendant. Nothing in the record justifies an assumption a man named Thompson existed. The matter was not presented to the trial court. Facts not appearing in the record may not be considered on appeal. (People v. Gardner, 71 Cal. 2d 843, 849.) Defendant's cross-examination afforded him an opportunity to assert a case of mistaken identity if, in truth, he then believed such was the case. However, defendant did not take advantage of this opportunity and his failure to do so indicates he had not discussed the matter with his counsel.

Defendant's contention his representation equated denial of counsel must be rejected under the facts in the case and the rule applied in People v. Floyd,

1 Cal. 3d 694, 709, People v. Ibarra, 60 Cal. 2d 460, 464 and People v. Garrison, 246 Cal. App. 2d 343, 351.

On the day of trial defendant moved for a continuance in order that he might procure other counsel. Thereafter, during the trial, he also requested permission to obtain other counsel. At the trial he was represented by the public defender. He assertedly wished to obtain private counsel. His requests were denied. Defendant's first appearance in court was November 12, 1969, when he was arraigned. The case was set for December 22, 1969, but was continued because he failed to appear; was reset for January 29, 1970, but was continued upon his motion; and was reset again for February 10, 1970. As noted, it was not until the latter date defendant requested he be represented by another attorney. During the trial he renewed his request, complain-

ing his attorney failed to properly represent him, stressing particularly the attorney's failure to subpoena witnesses. In response, the attorney related what had occurred. Following his appointment, he wrote defendant but the latter failed to answer any of the letters until December 22, 1969, the first trial date. On that occasion defendant reported he was ill. At the time a new trial date was set defendant was present; was requested to remain after court to talk to his attorney; but left without seeing the attorney. Several subsequent letters from the attorney were not answered. However, on January 20, 1970, nine days before the second trial date, the defendant came to the attorney's office. After consulting with defendant and obtaining the names of prospective witnesses the attorney instituted an investigation by investigators paid with funds supplied by court order. The investi-

gators interviewed all of the persons whose names defendant had given the attorney. On the day of trial defendant gave his attorney the names of two other witnesses but did not want them subpoenaed, stating they would attend voluntarily, It appears these witnesses did not attend. The record supports the conclusion defendant, prior to commencement of his trial, was represented by his present counsel in another criminal case pending in Los Angeles County, and also in a civil case. After his conviction his present counsel was substituted for the public defender and represented him at his probation hearing and upon pronouncement of judgement.

A defendant's right to appear and defend with retained counsel of his own choice is subject to the requirement he "act with some degree of diligence, and he may not demand a continuance if he

is unjustifiably dilat ry or if he arbitrarily desires to substitute counsel at the time of trial." (People v. Doebke, 1 Cal. App. 3d 931, 939; accord: People v. Durham, 70 Cal. 2d 171, 190; People v. Johnson, 5 Cal. App. 3d 851, 858; People v. Brady, 275 Cal. App. 2d 984, 992.) The conclusion defendant was dilatory in proceeding to obtain private counsel, a finding implied in the order denying his request, supports the order. No abuse of discretion was shown. Defendant's reliance upon the decision in People v. Crovedi, 65 Cal. 2d 199, is misplaced. (See People v. Durham, supra, 70 Cal. 2d 171, 190.)

The judgement is affirmed.

CERTIFIED FOR NONPUBLICATION.

We concur:

Coughlin
J.

Brown
P.J.

Ault
J.

APPENDIX B.

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUN 17 1971

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 4 Cal. App. No. 4269

People

vs.

Dobbs

Respectfully,

G. E. BISHEL
Clerk

[illegible] 1-71 3M OSP

APPENDIX C

Supreme Court of the United States

No. A-424 -----*October Term, 19*

SAMUEL MARCO DOBBS,

Petitioner,

v.

CALIFORNIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 10, 1971, without prejudice to the Court's consideration as to whether this application has been filed in time.

W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 21st day of October, 1971.

BEST AVAILABLE COPY